Damayanti Kantilal Doshi & Ors v Jigarlal Kantilal Doshi & Ors

COURT OF APPEAL — CIVIL APPEAL NO J-02-584 OF 1995
SHAIK DAUD, SITI NORMA YAAKOB AND AHMAD FAIRUZ JJCA
11 AUGUST 1998

Succession *— Executors — Revocation of appointment — Failure to take preliminary steps in administration of estate — Failure to render accounts — Failure to take appropriate steps to prevent dissipation of assets — Active hostility towards beneficiaries — Whether sufficient cause to revoke probate — Probate and Administration Act 1959 s 34*

The grant of probate — made in favour of the appellants as the executrix and executor of the estate of the deceased — has not been extracted after a lapse of seven years. The respondents — being beneficiaries of the estate — applied to revoke the probate. The respondents listed several grounds to support their application, inter alia: (i) failure to take preliminary steps in the administration of the estate; (ii) failure to render accounts or periodic accounts; (iii) failure to take appropriate steps to prevent dissipation of assets; and (iv) active hostility shown towards the respondents. The trial judge allowed the application. The appellants appealed.

Held, dismissing the appeal with costs:

There was enough material to support the allegations levelled against the appellants, that they had not properly discharged their duties as executrix and executor in the interests and welfare of the beneficiaries. In the light of this, the respondents had shown sufficient cause pursuant to s 34 of the Probate and Administration Act 1959 for the court to interfere with the wishes of the testator (see p 274D-E).

[Bahasa Malaysia summary

Pemberian probet — yang dibuat memihak kepada perayu-perayu sebagai pewasi harta pusaka si mati — telah tidak diekstrakkan selepas luputnya tempoh tujuh tahun. Penentang-penentang — sebagai benefisiari harta pusaka tersebut — memohon untuk membatalkan probet. Penentang-penentang menyenaraikan pelbagai alasan bagi menyokong permohonan mereka, antara lain: (i) kegagalan untuk mengambil langkah-langkah permulaan dalam pentadbiran harta pusaka tersebut; (ii) kegagalan untuk menyerahkan akaun-akaun atau akaun-akaun berkala; (iii) kegagalan untuk mengambil langkah sewajarnya untuk mencegah pelupusan aset-aset; dan (iv) penentangan aktif yang ditunjukkan terhadap penentang-penentang. Hakim perbicaraan membenarkan permohonan tersebut. Perayu-perayu membuat rayuan.

A **Diputuskan**, menolak rayuan dengan kos:

Terdapat material yang mencukupi untuk menyokong pengataan yang dilemparkan terhadap perayu-perayu, bahawa mereka tidak melaksanakan kewajipan mereka sebagai wasi dalam kepentingan dan kebajikan benefisiari. Memandangkan begitu, penentang-
B penentang telah menunjukkan kausa yang memadai menurut s 34 Akta Probet dan Pentadbiran 1959 untuk mahkamah mengganggu kehendak pewasiat (lihat ms 274D–E).]

Notes

C For cases on revocation of appointment of executors, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1895–1896.

Cases referred to

D *Fazil Rahman & Ors v AR S Nachiappa Chettiar* [1963] MLJ 309 (refd)
Hunter v Hunter & Anor [1937] NZLR 79 (refd)
Khoo Boo Gong (decd), Re; Khoo Teng Seong v Teoh Chooi Ghim & Ors [1981] 2 MLJ 68 (refd)
Letterstedt (Now Vicomtesse Montmort) v Broers & Anor (1884) 9 AC
E 371 (refd)
Lord Sudeley & Ors v Attorney General [1897] AC 11 (refd)
Shaw v Thomas [1954] NZLR 585 (refd)
Tan Khay Seng v Tan Kay Choon & Anor [1990] 1 MLJ 51 (refd)
William Loveday, In the Goods of [1900] P 154 (refd)

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Legislation referred to

Estate Duty Enactment 1941 ss 45, 45(iii), 45A
Probate and Administration Act 1959 s 34
Public Trustee Corporation Act 1995

G **Appeal from**: Originating Motion No 25–32 of 1994 (High Court, Johor Bahru)

Cecil Abraham (*Dhinesh Bhaskaran* with him) (*Shearn Delamore & Co*) for the appellants.

H *CV Das* (*Steven Thiru* and *Baidah Mohd Nor* with him) (*Skrine & Co*) for the first and third respondents.

G Shankar (*Zaman & Associates*) for the second respondent.

Shaik Daud JCA (delivering judgment of the court): This is an appeal from the decision of the Johor Bahru High Court which had on 29 July
I 1995, allowed an originating motion filed by the respondents herein. The respondents in their originating motion dated 17 September 1994 had applied under s 34 of the Probate and Administration Act 1959 ('the Act')

to revoke the probate granted to the first and second appellants as the executrix and the executor of the estate of the late Kontilal Prabhulal Doshi, known as KP Doshi ('the deceased'). They also applied for the appointment of the official administrator, in place of the first and second appellants, as the administrator with the will annexed of the estate.

The deceased died on 1 July 1991. Investigations into his death revealed that he had been murdered and his eldest son, the first respondent, was charged with the murder. The charge was later reduced to one of voluntarily causing grievous hurt, which charge, surprisingly, is still pending in the lower court to this date.

By his will dated 30 April 1991, the deceased left all his real and personal properties to the following:

(1) his lawful wife, Damayanti Kantilal Doshi ('the first appellant') 25%;
(2) his eldest son, Jigarlal Kantilal Doshi ('the first respondent') together with his wife, Shobhana Jigarlal Doshi ('the second respondent') 25%;
(3) his second son, Tilaklal Kantilal Doshi ('third appellant') 25%; and
(4) his youngest son, Jogesh Kantilal Doshi ('the second appellant') 25%.

An order for the grant of probate was made in favour of the first and second appellants herein as the executrix and the executor of the estate on 15 October 1991. The grant, however, has not been extracted even up to the time of this appeal, a lapse of seven years. Delay per se, may not be fatal but delay without an explanation, as in this case, may be sufficient ground for the beneficiaries to apply for the removal of an executor or an administrator of a deceased's estate.

The respondent's complaints listed the following in support of their originating motion:

(1) failure to take preliminary steps in the administration of the estate;
(2) failure to render accounts or periodic accounts;
(3) failure to take appropriate steps to prevent dissipation of assets;
(4) mismanagement and/or misconduct in selling assets at an under value;
(5) neglect and/or mismanagement of the company known as Alu Eoe Sdn Bhd;
(6) misconduct in taking steps to disrupt the ongoing business of the deceased; and
(7) active hostility shown towards them and the institution of endless litigations.

It is pertinent at this stage to examine the law on the power of the court to revoke a grant of probate or letters of administration. Section 34 of the Act provides that:

> Any probate or letters of administration may be revoked or amended for any sufficient cause.

A The power to revoke a grant of probate is vested in the High Court and may be exercised if the court is satisfied that there is sufficient cause to do so. In spite of this power it cannot be gainsaid that we are sensitive that the courts generally would be slow to interfere with the express wishes of a testator. Nevertheless s 34 of the Act empowers the court to interfere if sufficient cause is shown. The crucial question is what amounts to B sufficient cause. The phrase 'sufficient cause' has not been defined anywhere. In *Re Khoo Boo Gong (decd); Khoo Teng Seong v Teoh Chooi Ghim & Ors* [1981] 2 MLJ 68, the Federal Court had occasion to consider that same phrase and at p 69 of the report the following was expressed:

> C The power to revoke a grant of probate or letters of administration is vested in the High Court by s 34 of the Probate and Administration Act 1959 and can be exercised for 'any sufficient cause'. However, there is no definition of what is sufficient cause. But, if in the words of Jeune, President, in *In the Goods of William Loveday* [1900] P 154: 'the real object which the court must always keep in view is the due and proper administration of the estate and the interests of the parties beneficially entitled thereto,' then the test of D what is a sufficient cause is the due and proper administration of the estate and the interests of the beneficiaries. In our view, that is a strictly objective test.

(See also *Fazil Rahman & Ors v AR S Nachiappa Chettiar* [1963] MLJ 309 at p 310; and *In the Goods of William Loveday* [1900] P 154). The same test E was adopted by the High Court in *Tan Khay Seng v Tan Kay Choon & Anor* [1990] 1 MLJ 51 at p 54. In Australia and New Zealand, the test appears to be whether the executor is fit to act, but the line of cases shows that the court adopted the sufficient cause test (see *Hunter v Hunter & Anor* [1937] NZLR 794 (SC) and *Shaw v Thomas* [1954] NZLR 585 (SC)). From the line of cases, it can be seen that the courts have considered F the welfare and interests of the beneficiaries of the estate as the paramount criteria in deciding whether or not there are any sufficient cause to interfere.

In the present case, the High Court considered in detail the seven complaints levelled at the appellants; and after considering the numerous affidavits filed by both parties, came to the conclusion that in at least four G of the complaints, there are sufficient cause to interfere.

For the first complaint, it is not disputed that up to the time of the trial in the High Court, the appellants have not taken the first step of extracting the grant of probate. Probate was granted on 15 October 1991, some seven years ago. The contention that the High Court will normally disallow H the extraction of the grant of probate unless the estate duty payable is finalised and paid is no answer to the failure to extract. Section 45 of the Estate Duty Enactment 1941 endows a discretion on the court to issue the grant if the collector of estate duty has allowed payment of the estate duty to be postponed under s 45A thereof. In fact it is possible, by virtue of s 45(iii) thereof to settle the estate duty on a preliminary assessment of the I assets of the deceased person with the qualification of a further supplementary assessment being raised in the event of assets being discovered later.

There was no denial whatsoever that the appellants did not take any step to ascertain the debts of the estate as is required of them by the will.

In fact, this could have been done without extracting the grant. There was also no denial that no steps had been taken to even ascertain and list out the assets of the deceased, as the will itself did not identify such assets. Since the distribution of the estate is to be made subject to and after payments of all the deceased's debts, funeral and testamentary expenses and estate duty, the ascertainment of the assets and liabilities of the estate is of paramount importance in order to determine how much each beneficiary's 25% share is worth. In *Lord Sudeley & Ors v Attorney General* [1897] AC 11, Lord Halsbury LC at p 16 observed:

> ... it is a condition precedent to know what the residuary estate is, and until that has been ascertained you cannot tell of what it will consist.

Therefore, the failure to ascertain the residue of the estate available for distribution after nearly four years of executorship suggest strongly that the executors are not serious about discharging their basic duty which is to undertake the distribution and the winding up of the estate as soon as is practicable.

On the complaint of the failure to render accounts or periodic accounts, the conduct of the appellants showed an obvious reluctance to render such accounts. This is in spite of four years of executorship. Up to the date of the trial, no accounts had been rendered. In fact, the record shows that two months after the respondents filed their originating motion, an application was made by them to obtain an injunction to restrain the appellants from dealing in whatsoever manner in the assets of the estate. At the hearing of that application, learned counsel for the appellants informed the court that accounts were being prepared but right up to the date of the judgment in July 1995, the accounts were neither prepared nor submitted. This is clear evidence of reluctance to render accounts or in any way be accountable as to the financial position of the estate. The very first time the accounts were filed was in December 1995 when this court ordered, as a condition of an order of stay of the Johor Bahru High Court order, that the second appellant file and serve an affdavit containing the accounts to the respondents within one month of the date of the stay. The delay to extract the grant of probate is clearly deliberate for until that was done, there is no obligation to distribute and wind up the estate.

The duty to render accounts is one of the basic duties of all executors or trustees. It is the duty of the personal representatives to keep clear and accurate accounts, and to be ready at all times to render such accounts when called upon to do so, see 17 *Halsbury's Law of England* (4th Ed) at para 1551 under 'Liability to Account'. By the terms of the deceased's will, the issue of accounts is all important since the residue for distribution is derived at only after deductions of debts and expenses have been made. Without the accounts being rendered periodically or at all (as in this case), the beneficiaries would not have any means of knowing whether the estate is being administered properly.

On the failure to take steps to prevent dissipation of assets, the respondents alluded to the sale of a shophouse at No 40, Jalan Tuanku Abdul Rahman, Kuala Lumpur, held in the joint names of the deceased

A and his brother, BP Doshi. The brother had purportedly sold this property for a sum of RM1m after the death of the deceased and had purportedly retained 50% of the purchase price which rightly belongs to the estate. Quite apart from stating that they objected to the sale, no steps had been taken by the appellants to recover the estate's share of the purchase price. As responsible executrix and executor having the welfare and interests of the beneficiaries, the appellants should have taken steps firstly to restrain the sale and if this was unsuccessful to at least taken steps to recover the estate's share of the proceeds of sale.

From the facts adduced and the various suits filed in various courts by the respective parties, it is undoubtedly clear that as between the appellants in particular the second appellant and the first and second respondents, there exists not just animosity or disagreement between them but that their relationship can safely be said to be one of open and active hostility. That relationship is such that it would be nigh impossible for the second appellant to fairly and impartially discharge his duties towards the respondents/beneficiaries.

This hostility has manifested itself in the endless litigations commenced by both parties against each other and these actions have produced a number of interlocutory orders that were sought and obtained in the form of injunctions, discoveries and appointment of receivers. This in turn have led to allegations of non-compliance with court orders which culminated in actions for contempt. There has not been any denial that estate funds were being utilised to finance the spate of cases which may not see the light at the end of the tunnel. On the criminal side, the first respondent was initially accused of the murder of the deceased. This murder charge was subsequently withdrawn and substituted with a charge of voluntary causing grievous hurt. The first respondent contends that the second and third appellants were responsible for making false allegations against him, resulting in the criminal proceedings. If this is not clear evidence of direct and open hostility, we do not know what is.

While it is true that friction or hostility between the parties per se may not be a good reason for the removal of the appellants as the executrix and the executor, such hostility if grounded in the manner in which the estate is being administered or not being administered, is a matter that ought not to be disregarded. In this respect Lord Blackburn in *Letterstedt (Now Vicomtesse Montmort) v Broers & Anor* (1884) 9 AC 371 at p 389 said:

> It is quite true that friction or hostility between trustees and the immediate possessor of the trust estate is not of itself a reason for the removal of the trustees. But where the hostility is grounded on the mode in which the trust has been administered, where it has been caused wholly or partially by substantial overcharges against the trust estate, it is certainly not to be disregarded.
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> Looking therefore at the whole circumstances of this very peculiar case, the complete change of position, the unfortunate hostility that has arisen, and the difficult and delicate duties that may yet have to be performed, their Lordships can come to no other conclusion than that it is necessary, for the welfare of the beneficiaries, that the Board should no longer be trustees.

Another very important feature of this case is that the deceased by his will had appointed his wife, the first appellant, and son second appellant as joint executors. In reality, this is a single person executorship as the second appellant is in complete control of the estate. The first appellant mother is old and illiterate. She has always been a housewife and her name was used by the deceased who appointed her as director and a shareholder in several family companies whilst the second appellant is legally qualified. It does not leave much to the imagination that for all intents and purposes this is a case of a single executorship under the command of the second appellant. In the light of this scenario, it can safely be inferred that all decisions pertaining to the estate are obviously made by the second appellant solely. This is evident in all the affidavits filed for the appellants as they are all deposed to singly by the second appellant without even an averment that he had been duly authorized by the first appellant to depose to the said affidavits on her behalf. This invites the question as to whether the first appellant is at all aware of the various actions taken by the second appellant or whether she approves of them.

Against this background, and having gone through the record of appeal ourselves, we agree with the finding of the learned judge that there is enough material to support at least four of the seven allegations levelled against the appellants, that they have not properly discharged their duties as executrix and executor in the interests and welfare of the beneficiaries. In the light of this, we also agree that the respondents had shown sufficient cause pursuant to s 34 of the Act for the court to interfere with the wishes of the testator. In the light of the evidence, we find that to allow the appellants to continue as executrix and executor would not solve the numerous problems which have plagued the estate. We agree with the learned judge that the official administrator would be able to act independently and expeditiously in all respects for the benefit of the beneficiaries. We see no reason to interfere with the exercise of the discretion by the learned judge. We dismissed the appeal with costs and ordered that the deposit be paid to the respondent to go to account of their taxed costs.

In the course of the appeal, it was argued on behalf of the appellants that if the court was minded to revoke the appointments of the first and second appellants as excecutrix and executor of the estate, it was not proper to appoint the official administrator in their places. In the light of this intention, we had proposed that both parties suggest a mutually agreed candidate or candidates who is or are willing to be appointed in place of the first and second appellants. The court would be prepared to make such appointment or appointments. For this purpose, we gave the parties a period of 14 days, failing which the order of the High Court stays subject to the variance that pursuant to the Public Trustee Corporation Act 1995, the Public Trustee Incorporated be appointed instead.

Appeal dismissed with costs.

Reported by Loo Lai Mee